IN THE SUPREME COURT
STATE OF ARIZONA

PHOENIX UNION HIGH SCHOOL DISTRICT NO. 210,
Petitioner/Defendant

v.

HON. JOAN M. SINCLAIR, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge

and

CHRISTOPHER A. LUCERO, a minor child, by and through his natural father, CHRISTOPHER J. LUCERO,
Real Party in Interest/Plaintiff

Arizona Supreme Court
CV-24-0307-PR

Arizona Court of Appeals
Division One
1 CA-SA 24-0205

Maricopa County Superior Court
CV2022-005719

REAL PARTY IN INTEREST'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Real-Party-in-Interest/Plaintiff Christopher Lucero ("Plaintiff") hereby responds in opposition to Phoenix Union High School District No. 210's ("the District") Petition for Review. There is no need to accept review of this interlocutory appeal on less than a full record because the District has an adequate appellate remedy of appeal after an adverse verdict. Even if the District's Petition presented issues of statewide importance that justified this Court accepting review—and the Petition does not because as the trial court found in denying summary judgment this case fits squarely within the duty framework identified by this Court in *Dinsmoor v. City of Phoenix*, 251 Ariz. 370 (2021)—there is no need for this Court to take the extraordinary step of review of a special action for which the Court of Appeals declined jurisdiction. Accordingly, the District's Petition should be denied.

JURISDICTIONAL STATEMENT

This Court generally prefers to wait until after final judgment to review pretrial rulings "because an interlocutory appeal 'often frustrates the expeditious resolution of claims, unnecessarily increases both appellate course caseload and interference with trial judges, harasses litigants with prolonged and costly appeals, and provides piecemeal review."[1]

1. *Denton v. Superior Court*, 190 Ariz. 152, 154 (1997) (quoting *City of Phoenix v. Yarnell*, 184 Ariz. 310, 315 (1995)).

The District's Petition seeks interlocutory review via a special action of the trial court's denial of the District's motion for summary judgment. The Court of Appeals declined jurisdiction of the District's special action, finding an "absence of extraordinary circumstances warranting exercise of jurisdiction . . . ."[2] This Court should likewise decline jurisdiction and for the same reason. Other than complaints about having to waste time and money on a "pointless trial," the District offers no reason why the Court should accept review now, rather than waiting to see what happens with the trial and the subsequent appeal by the District should the verdict be in Plaintiff's favor. The "harm" of having to try a case before appealing a denial of summary judgment would apply to almost every Arizona civil case and is hardly an "extraordinary circumstance" justifying review under these circumstances.

Further, the District asks for urgent extraordinary relief when it showed no urgency itself. The District delayed seeking special action review of the denial of summary judgment for almost seven months. The Petition now conflicts with the upcoming trial scheduled to start on March 31, 2025. The Court should deny the Petition and decline jurisdiction because the District's own inaction betrays its claim for expedited relief.

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2. Order Declining Jurisdiction, Dec. 4, 2024, at 2.

STATEMENT OF THE ISSUES

I. Whether the District's Petition should be denied because the District has an adequate remedy through appeal after a final judgment.

II. Whether the District's Petition should be denied because it unreasonably delayed seeking special action relief.

III. Whether the District's Petition should be denied because the superior court correctly decided the District's motion for summary judgment.

STATEMENT OF FACTS

I. Background.

Because the Court should deny the District's Petition on jurisdictional grounds for the reasons stated herein, and because the duty issue raised in the District's Petition "is a legal matter to be determined *before* the case-specific facts are considered,"[3] the Court should not spend significant time in its review of this interlocutory appeal studying the facts of this case. By the time the Court considers the Petition, a trial likely will have occurred which may alter or even render moot the current version of the record. Nevertheless, because the District has submitted only a self-serving partial record of the events at issue, Plaintiff/Real-Party-in-Interest Christopher Lucero provides a fuller picture of the record for the Court's review below.

A. The long history of the dangerous traffic around Betty Fairfax High School.

Betty Fairfax High School (BFHS) is located at the corner of 59th Avenue and South Mountain Avenue in southwest Phoenix.[4] The intersection at Baseline Road and 59th Avenue just north of the school is a signalized intersection, and in the southwest corner of that intersection is a commercial strip center with shops and restaurants.[5]

Figure 1: Approximate Crash Location and Vicinity

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3. *Gipson v. Kasey*, 214 Ariz. 141, 145 ¶ 21 (2007).
4. Plaintiff's Appendix (Appx.) Ex. 1.
5. Appx. Ex. 1.

Many students visit the shopping center before and after school, crossing 59th Avenue to and from BFHS mid-block outside of any marked crosswalk.[6] There are no crosswalks across 59th Avenue south of the signalized intersection at Baseline Road.[7]

Pickup and drop-off times at BFHS can be hectic[8], and a line of cars waiting to drop off or pick up students will develop.[9] The morning of August 3, 2021, that line of cars on southbound 59th Avenue backed up all the way to the intersection at Baseline Road to the north.[10]

BFHS opened for the first time in August 2007.[11] The District did not create a traffic plan for the high school at the time it was founded.[12] Don Cross, the City of Phoenix's longtime School Safety Coordinator, recalled talking to the BFHS Principal in 2007 around when the school opened about whether school zone crosswalks were possible and parking issues.[13] Mr. Cross never again heard from anyone from BFHS or the District about traffic issues around BFHS from the time the school opened until the incident out of which this lawsuit arises in early August 2021.[14]

Across 59th Avenue to the west of BFHS in 2021 was a large, undeveloped dirt

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6. Appx. Ex. 2, Ex. 3.
7. Appx. Ex. 1, Ex. 2, Ex. 4.
8. Appx. Ex. 8
9. Appx. Ex. 7
10. Appx. Ex. 7, Ex. 8.
11. Appx. Ex. 6.
12. Appx. Ex. 4.
13. Appx. Ex. 2.
14. Appx. Ex. 2.

lot.[15] At some point in the early years of BFHS—and likely from the time the school was founded—parents coming to BFHS for pickup and drop-off southbound on 59th Avenue began pulling into the dirt lot on the west side of 59th Avenue to avoid the line of cars waiting to turn left into the school.[16] Dozens of kids would then jaywalk across 59th Avenue either to get to the school or to get to their parents waiting for them in the dirt lot.[17]

After Plaintiff's son Christopher "CJ" Lucero, Jr. was injured, a woman named Elizabeth Douglas who was a teacher at BFHS from 2012-14 wrote to say that when she worked there the "traffic in the morning was bad and even worse in the afternoon as cars lined up to get onto campus to pick up students."[18] Since a lot of cars were driving around the school at those times, that meant the kids were "darting around traffic" to get to and from school and it was "a wonder a horrible accident had not happened sooner."[19]

A couple of days after CJ was hit, Mr. Cross came to BFHS to observe pickup and dropoff on August 5 and 6, 2023.[20] He observed 92 students jaywalking across 59th Avenue on the morning of August 5 before school, and 127 students jaywalking across

15. Appx. Ex. 1, Ex. 2.
16. Appx. Ex. 2, Ex. 10.
17. Appx. Ex. 8.
18. Appx. Ex. 10.
19. Appx. Ex. 10.
20. Appx. Ex. 2.

59th Avenue when school was over on August 6.[21] This was not limited to just kids crossing the street to and from the dirt lot; his numbers included students crossing 59th Avenue traveling between the shopping area at Baseline and 59th and the school outside of any marked crosswalk.[22] His observations after CJ was injured were the first time that he had ever heard of or seen parents parking in the dirt lot and students crossing 59th Avenue in such numbers.[23] If he had known about it before CJ was injured, he would have recommended the same changes that he made after CJ was injured.[24] He acknowledged that a little over 100 kids crossing 59th Avenue mid-block outside of a crosswalk twice a day at the highest traffic time for 59th Avenue "***was an unsafe condition*** that was created by the number of cars in the area and then the students crossing in between the cars."[25] When asked whether the situation on 59th Avenue outside BFHS was a safe place for students, he agreed it was not:

COMBS	But given that there was that situation, ***you would agree that's not a safe place for students***?
NELSON	Form. Foundation.
WELKER	Join.
WITNESS	***Well, yeah.*** That's why we recommended that we eliminate that activity on the west side of the road, so there wasn't that crossing.[26]

21. Appx. Ex. 2 (at deposition transcript at 123:12-17); Ex. 3.
22. Appx. Ex. 2 (at deposition transcript at 130:1-7).
23. Appx. Ex. 2.
24. Appx. Ex. 2.
25. Appx. Ex. 2 (at deposition transcript at 123:18-124:22; emphasis added)
26. Appx. Ex. 2 (at deposition transcript at 139:9-14; emphases added).

The BFHS Assistant Principal at the time of the crash likewise testified that around 100 kids jaywalking across 59th Avenue before and after school every day was a safety concern.[27]

The District thus created a known safety issue just outside the gates of BFHS and allowed that safety issue to exist for many years before CJ was injured without doing anything about it. It never asked the City to help ameliorate the hazard, and it never warned its parents or students about the danger.

B. The August 3, 2021 crash.

August 3 was the second day of the 2021-2022 school year at BFHS. Appx. Ex. 7. Plaintiff's son CJ Lucero was a 14-year-old freshman attending BFHS for the first time.[28] After his parents drove him to school the first day, CJ decided that he wanted to walk to school to be more independent.[29] CJ's parents agreed to allow him to walk to school, and CJ left his house for BFHS on August 3, 2021, around 7:45 a.m.[30]

Because of his brain injury and the trauma of the collision which left him in a coma for weeks afterwards, CJ has no memory of that morning.[31] We will thus never know how or why he ended up on the west side of 59th Avenue when the straightest path to BFHS from his house would have been to stay on the east side of the street. He

27. Appx. Ex. 7 ("I would think 100 people jaywalking would be a safety issue.").
28. Appx. Ex. 12.
29. Appx. Ex. 12.
30. Appx. Ex. 12.
31. Appx. Ex. 12.

certainly would have seen many other students congregating at that shopping center before heading south on the west side of 59th Avenue.[32] The most reasonable inference is that he was just following the crowd.

As CJ walked south on the west side of 59th Avenue towards the high school, he would have seen the dozens of kids jaywalking through traffic to cross 59th Avenue that both Don Cross and school administrators observed before and after CJ was injured.[33] There are no crosswalks anywhere south of Baseline across 59th Avenue[34], and defense witnesses testified that kids would cross 59th Avenue to get to school both near the LACC and further south.[35] As CJ approached the main entrance to the school off 59th Avenue, there was a line of southbound cars backed up in the left turn lane waiting to turn left into the school.[36] As those cars came to a complete stop, CJ cut between them and tried to cross the northbound lane of 59th Avenue.[37]

At the same time CJ was walking southbound on 59th Avenue, 19-year-old Shadia Barnett was dropping off her younger brother at BFHS.[38] She testified to how busy the traffic was that day; there were so many cars waiting to turn left off southbound 59th Avenue into the school that the line backed up all the way to Baseline and she

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32. *See* Appx. Ex. 6, Ex. 7, Ex. 8.
33. Appx. Ex. 2, Ex. 6, Ex. 7, Ex. 8.
34. Appx. Ex. 1, Ex. 2.
35. Appx. Ex. 2, Ex. 6, Ex. 7, Ex. 8.
36. Appx. Ex. 13; *see also* Ex. 8.
37. Appx. Ex. 5 (expert report dated August 7, 2023, which at page 1 describes crash).
38. Appx. Ex. 13.

couldn't even get into the turning lane.[39] Because she couldn't get into the left turn lane, Ms. Barnett drove southbound on 59th Avenue, did a U-turn using the dirt lot on the west side of 59th Avenue, dropped her brother off on the east side of the street, and then headed north back towards Baseline Road.[40]

As Ms. Barnett drove north on Baseline after dropping off her brother, tragedy occurred. Ms. Barnett's vehicle first struck CJ's torso, which caused his upper body and head to strike the hood and windshield.[41] The impact launched CJ in the air before he landed and skidded along the road, over the curb, and into the landscaped area along the sidewalk before eventually striking a fire hydrant in the dirt just outside the school fence.[42] Plaintiff's collision reconstruction expert Dr. David Bosch estimates that CJ flew in the air and skidded 74.6 feet before crunching into the fire hydrant.[43] CJ came to rest in the gravel next to the sidewalk just a few feet outside the school as shown in the diagram on page 6 of the District's Petition for Special Action. He suffered a traumatic brain injury that left him hospitalized for month, and Plaintiff alleges he has suffered permanent loss of cognitive function.

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39. Appx. Ex. 13.
40. Appx. Ex. 13.
41. Appx. Ex. 14 (Plaintiff's disclosed crash investigation expert report, which at pages 8-9 describes crash).
42. Appx. Ex. 14.
43. Appx. Ex. 14.

LEGAL ARGUMENT

The Petition seeks reversal of the Maricopa County Superior Court's March 6, 2024 Underadvisement Ruling denying the District's motion for summary judgment. This Court has held that review by appeal following the ultimate entry of judgment is an adequate remedy for an allegedly wrongful denial of a summary judgment motion or motion to dismiss.[44] There is nothing in this case so pressing or urgent that special action is warranted. The District retains the right to have these issues heard on appeal following trial and if there is a judgment in Plaintiff's favor. Appellate review after a verdict is even more appropriate where, as here, the District asks the Court (and asked the trial court) to make a finding that Plaintiff has "no evidence" in which to prove the elements of breach and causation. These kinds of fact-specific inquiries are both for the jury and individualized to the facts of this case such that interlocutory review of the denial of special action jurisdiction would not address any issue of "statewide importance" that would justify interlocutory review on less than a full record.

Further, the District egregiously delayed bringing its Petition for Special Action for almost seven months from the Hon. Joan Sinclair's ruling denying summary judgment (from March 7 to September 27). The District appears to be using the pending Petition to attempt to delay the upcoming trial set for March 31, 2025. After not previously seeking a stay with the trial court through the filing and litigation of its

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44. *United States v. Superior Court*, 144 Ariz. 265, 269 (1985).

Petition for Special Action, on January 7, 2025 the District filed a motion to stay the trial court proceedings and continue the upcoming trial until its Petition for Review to this Court is adjudicated. That motion is still pending as of the filing of this response brief. The District's decision to wait nearly seven months to file its Petition constitutes an inexcusable delay and by itself warrants the Court denying jurisdiction.

Finally, the District is wrong on the merits as well. It seeks the creation of a remarkable new legal rule that schools and school districts should be excused from all liability as a matter of law for creating and failing to warn of unreasonably dangerous conditions right outside the school grounds when that unreasonably dangerous condition injures one of its students. Even if the school district knew about the condition and ignored it, even if the school district actually created the danger through unsafe administrative practices. This is not the law in Arizona for schools nor any other business or entity. All entities in Arizona that are open to the public—including and especially schools—have a duty to patrons to make access to their premises reasonably safe.[45] In *Stephens v. Bashas' Inc.*, this Court held that a grocer owed a duty to an invitee-driver injured while opening delivery truck doors on adjacent public street because businesses have a duty to provide a reasonably safe means of ingress and egress for invitees.[46] In *Udy v. Calvary Corp.*, the Court of Appeals held that a landlord owed a tenant-child a duty even though the child was injured when he ran into a busy road next

45. *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 375 ¶ 12 (2021).
46. *Stephens v. Bashas' Inc.*, 186 Ariz. 427, 430-31 (App. 1996).

to the unfenced premises.[47] In the school context, the Court's recent opinion in *Dinsmoor* approved of the logic and holding of *Warrington v. Tempe Elementary School District No. 3*, where the Court of Appeals held that a school district owed a duty of care to a student injured while walking home from a bus stop.[48] Anticipating the exact situation in the instant case, the Court established that ***a duty is owed to a student injured because a school did not provide a safe way for students to get to campus***:

> [A] school's duty to provide a reasonably safe means of ingress and egress does not evaporate if a student is injured off campus while trying to enter school property to attend classes.[49]

Here, the undisputed facts are that the District created an unreasonably dangerous condition around BFHS through a parent drop-off and pickup procedure that caused 100 kids or more to be jaywalking across the street bordering the school every morning and afternoon. The District's actions and inactions thus created a duty of care to students like CJ Lucero trying to get to school and injured just outside the school grounds while doing so.

The District's arguments for accepting interlocutory review of the trial court's rulings on breach and causation are even more fallacious. The trial court correctly determined that Plaintiff had substantial evidence of both breach and causation, and

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47. *Udy v. Calvary Corp.*, 162 Ariz. 7, 11 (App. 1989).
48. *Dinsmoor*, 251 Ariz. at 375–76 ¶ 23 (citing *Warrington v. Tempe Elementary School District No. 3*, 187 Ariz. 249, 253 (App. 1996)).
49. *Id.* (citing *Stephens*, 186 Ariz. at 430-31).

that resolving those issues involved questions of material fact that could only be decided by the jury. This is indisputably the law in Arizona.[50]

The Court can see from the evidence cited herein that Plaintiff does in fact have substantial evidence to prove both breach and causation. Causation and breach are not issues that can be decided on summary judgment, much less on interlocutory review of a denial of summary judgment. The Court should deny jurisdiction to allow the jury to decide these factual questions. If the District then wants to seek appellate review it can do so on a full record.

CONCLUSION

Because the District seeks review of a denial of summary judgment for which it has an adequate remedy on appeal after judgment, and the other reasons stated herein, this Court should deny the District's petition for interlocutory review.

RESPECTFULLY SUBMITTED this 22nd day of January 2025.

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50. *See, e.g., Ritchie v. Krasner*, 221 Ariz. 288, 295 ¶ 11 (App. 2009); *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 437 ¶¶ 9-10 (App. 2007).

APPENDIX (NOTICE)

Concurrent with and separate from the filing of this Response to Petition for Review, Real Party in Interest has filed an Appendix pursuant to ARIZ.R.CIV.APP.P. 13.1.